No. 01-803

IN THE SUPREME COURT OF THE UNITED STATES

FRANK X. HOPKINS,
Warden of the
Nebraska State Penitentiary,
Petitioner,

vs.

JOHN BYRON NEWMAN,Respondent.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEAL FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. THE EIGHTH CIRCUIT COURT OF APPEALS CORRECTLY FOUND THAT THE LOWER COURTS' ADJUDICATION OF NEWMAN'S FEDERAL CONSTITUTIONAL CLAIM RESULTED IN A DECISION THAT INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES.

The Petitioner mischaracterizes the Circuit Court's analysis regarding how the state courts created a *per se* ban on Newman offering his voice exemplar at trial. An examination of what occurred at trial, when Newman wanted to read a statement to the jury so that they could hear the sound of his voice, must be undertaken (1) to properly understand the context in which Newman made the offer, (2) to properly understand how the trial court's erroneous ruling effectively foreclosed Newman from offering any evidence regarding the sound of his voice, and (3) to place the issue into proper constitutional context.

There can be no real dispute that the credibility of the victim's identification of Newman as her attacker was the primary disputed issue at both of Newman's jury trials. In this regard, the inability of Newman's first jury to reach a unanimous verdict highlights how every identifying characteristic, including whether Newman possesses a Hispanic or Mexican accent, was vital to his defense. Noteworthy is that testimony was adduced from several prosecution trial witnesses regarding whether Newman possessed a Mexican or Hispanic accent. Trial transcript at 192, 224, 247, 391-92, 496-98, 706, 739, and 751. Thus, the relevance of Newman's voice exemplar offer can not be disputed.

When the state rested and Newman's opportunity for presenting evidence arose, he opted only to give a voice exemplar to show that he had no Mexican or Hispanic accent. A close examination of the trial record regarding the proposed voice exemplar is necessary to give proper consideration to the petition for writ of certiorari. The trial record states as follows:

> THE COURT: The motion [for directed verdict of acquittal] is overruled. At this time there are several matters that we should take up. First of all, I would like to advise the defendant that he has a right against self-incrimination, which means that he is not required to testify, and he can not be made to testify during the course of this trial. You have a right as well to testify. In other words, you can testify under oath and testify like any other witness, but then you would be subject to cross-examination. The exercise of one right necessarily waives the other right, do you understand?
>
> THE DEFENDANT: Yes.
>
> MR. VANDERSLICE: Judge, in that regard, I would like to move the Court to permit Mr. Newman to give a voice exemplar to the jury. Now, I think the case law indicates that a person can give a voice exemplar, meaning just the sound of one's voice, without waiving any privilege against self-incrimination because it's not testimonial in nature. I think - - what I would propose, Judge, is that we have Mr.

Newman stand when we call back the jury and say something that's fairly innocuous like Deputy Stebbing testified to, "My name is John Newman. I had asked for an attorney when I was coming back with Mr. Stebbing. The weather was nice," something to that effect, so that the jury can hear Mr. Newman's voice. I don't think that he waives his privilege against self-incrimination by giving such an exemplar. It would be very similar to, for example, giving a blood sample or pubic hair, et cetera. I think that the jury does - - Mr. Newman does have a right to have the jury hear his voice, and I would ask the Court for leave to do so.

MS. NELSON: The State would object to that. I think that [the victim] has testified to certain phrases and words that he has said and unless those phrases are also included, the State would certainly object to that in terms of reproducing those conditions. I don't think that that would be at all indicative of those conditions, and I don't think that those are the types of conditions that are reproducable.

MR. VANDERSLICE: Judge, we're talking about people who have also testified about the sound of his voice, a Hispanic accent. I think we should permit the jury to hear that and make a decision for themselves as to what the sound of his voice appears to be to them.

THE COURT: Well, I know that, for example, the State's last witness [Deputy Stebbing] - - Obviously, you were not eliciting what the defendant said as testimony, you were introducing that to show the sound of his voice, otherwise we would have had other problems that we would have had to deal with before it would have been admissable.

MS. NELSON: I certainly was not asking him to tell us anything about what the defendant said, that's true.

THE COURT: That's true.

MR. VANDERSLICE: No, but you asked him what - - did he have an accent, or what did his voice sound like, in essence.

MS. NELSON: No, I think I said if he detected anything himself. His own opinion. I asked him his opinion. I didn't ask him - - I asked him his opinion as to whether there were any speech impediments or anything that he noticed.

MR. VANDERSLICE: And he said yes and proceeded to tell what his opinion - -

MS. NELSON: That he noticed. The evidence is their opinion.

THE COURT: Okay. Well - -

MR. VANDERSLICE: Judge, if permitted to do so, I would object to having something said like Ms. Smith, "I'm going to bash your F-ing head in," or - - I think that if the statements are made to the jury, they

should be somewhat innocuous, just so they can hear the sound of his voice.

THE COURT: Well, I'll reserve ruling until we get back, but I would like to see the authority that you have that tells me this isn't testimony. In other words - -

MR. VANDERSLICE: Well, from the top of my head, I think there's a case called Schmerber, which is the United States Constitutional opinion that basically says things like voice exemplars - -

* * * *

THE COURT: All right. Excepting from my comments the words of your counsel, in other words, keeping that as a separate issue, the voice exemplar, have you decided whether you can to testify or not?

THE DEFENDANT: Yes, I have.

THE COURT: What have you decided?

THE DEFENDANT: I decline to testify.

* * * *

THE COURT: Let the record reflect that we are outside the presence of the jury, that counsel for the defendant and counsel for the State are meeting in chambers with me. Counsel for the defendant, who is about to start his case in chief has indicated that he wants to put on the defendant for purposes of giving his voice exemplar without any

testimony as such. Is that - Well, rather than me state your position, why don't you state your position?

MR. VANDERSLICE: Yes, Judge, basically that is my position. I don't believe that there is a privilege against self-incrimination issue here because of the United States versus Wade case which basically holds that the sound of one's voice is not testimony under the Fifth Amendment. It is our position that Mr. Newman should be able to read an innocuous statement, meaning a statement that is fairly neutral, "My name is John Newman. I was born on - -" such and such a date, words to those effect before the jury so that they can determine whether or not he has a Hispanic accent. I would submit that he can just read from that statement and he doesn't need to be sworn in. Basically, then the jury can decide whether or not he does have a Hispanic accent. I don't think there is a privilege of self-incrimination issue here, and I think that the jury is entitled to hear that evidence.

THE COURT: What's the State's position?

MS. NELSON: The State objects, Judge. Specifically, the Wade case is a case that is not on point as we sit here today in terms of the defendant standing up and speaking directly to the jury. The Wade case talks about whether identifications of other witnesses that testified at a trial ought to be able to give those identifications that they made

from a line-up prior to trial where the defendant in the Wade case was asked to speak at the line-up and then they made identification based on that speech at that time. It's different, because it's a pretrial line-up identification by witnesses, not something talking about a defendant speaking to a jury non-testimonially, and that's not at all what the Wade case talks about and says.

THE COURT: The objection is sustained.

MR. VANDERSLICE: Judge, I would like to note for the record that I would like to make a due process argument related to not permitting Mr. Newman to make that kind of a statement in front of the jury.

THE COURT: Very well.

MR. VANDERSLICE: It violates his right to due process and to present evidence that should be presented to the jury.

THE COURT: So there is no mistake about the ruling, the defendant is entitled to testify in any voice that he wants to, however, I will sustain the objection to his testimony other than under oath and to be given the full scope of cross-examination.

Trial transcript at 756-62.

Having reviewed what actually occurred in the trial court now permits Petitioner's argument to be examined in the proper context.

The primary thrust of Petitioner's first argument is that presenting evidence of a Hispanic accent is "...a matter of state evidentiary law, pure and simple." Petition at p.15. Thus, because the "...matter simply is not one of either constitutional magnitude or susceptible of constitutional interpretation[,]" Petitioner posits that *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed. 385 (1991) mandates that Newman's claim for habeas relief is improper. Several facets of Petitioner's argument, however, are wrong.

There is no question but that Newman's constitutional rights to present a defense and to exercise his privilege against self incrimination are involved when the trial court erroneously ruled that Newman had to waive his Fifth Amendment privilege by giving a voice exemplar to the jury. Such an erroneous ruling obviously had far reaching constitutional ramifications that have been discussed by all appellate courts addressing the issue. Petitioner even acknowledges this constitutional error. Petition at 16. Thus, Petitioner's attempt to relegate this claim to a mere evidentiary ruling is easily dismissed.

Petitioner's attempt to twist the meaning of *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed. 385 (1991) to the facts of this case is equally unavailing. While the holding of *Estelle* (*i.e.*, that federal habeas relief does not lie for errors of state law) is not disputed, the application of *Estelle* to this case is.

Estelle involved a situation where petitioner claimed that the admission of battered child evidence at his homicide trial violated due process. This Court noted

that "...the Court of Appeals relied in part on its conclusion that the evidence was 'incorrectly admitted...pursuant to California law.'" *Estelle* at 67. In contrast, Newman's case never actually involved the application of Nebraska evidentiary or procedural rules to whether Newman could offer to the jury the sound of his voice. Instead, the trial court focused solely upon whether Newman must waive his Fifth Amendment privilege against self incrimination by offering his voice sample to the jury. In fact, as the above trial excerpt clearly indicates, Newman's counsel provided supporting constitutional precedent to the trial court [illegible] *States v. Wade*, 388 U.S.218, 87 S.Ct. [illegible] *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. [illegible] support of the principle that Newman should be able to let the jury hear the sound of his voice without waiving his Fifth Amendment privilege. Accordingly, Petitioner's claim that no constitutional interpretation was ever involved is simply incorrect. To the contrary, as the above trial excerpt also clearly shows, relevance, reliability, and admissibility of Newman's voice sample was never disputed at the trial level. Only waiving his testimonial privilege by giving a voice exemplar and only his due process right to present evidence were discussed. The [illegible] to apply *Estelle* to this case is misplaced.

One of Petitioner's primary argum[illegible] that the trial court's erroneous ruling and [illegible] sions created a *per se* ban on offering [illegible]

Here, it must be noted that for Newman, the erroneous trial court ruling essentially foreclosed him from offering ANY evidence, even regarding the admissibility and reliability of the sound of his voice, because he was not going to give testimony and be subject to cross examination under any circumstances. In other words, Newman was not going to risk being compelled to "testify" subject to cross examination by saying one word to the jury. In effect, the trial court's error placed Newman into the Hobson's choice of waiving his Fifth Amendment privilege in a situation where such waiver was not constitutionally mandated. Under such circumstances, the state

Supreme Court's characterization of the issue as an "Other Evidentiary Ruling" must also be addressed. As stated, the trial court made no inquiry regarding the admissibility of Newman's voice sample. The admissibility question was only raised by the appellate courts. As far as the trial court was concerned, Newman's voice sample was admissible as long as he waived his privilege. Thus, again, recognition must be given to the proper context in which the voice sample was originally raised.

Estelle, must be decided in Newman's favor. Contrary to the Petitioner's view, state law evidentiary admissibility was never an issue at the trial court level, but constitutional considerations have always been implicated by the voice sample issue. Such was recognized by the Circuit Court when it correctly analyzed this issue. *See*, Petitioner s Appendix at App. 4-8. Accordingly, Petitioner's characterization of the voice exemplar issue as a state law evidentiary question covered by *Estelle* is disingenuous and wrong.

Petitioner also argues, somewhat parenthetically at the end of its first

complains that there is no "clearly established federal law" related to offering voice exemplars at trial such that a reviewing habeas court could properly analyze whether constitutional principles were wrongly applied below. Petitioner's Brief at 17-18.

In short, Petitioner's analysis is incorrect. Respondent would simply refer this Court to the reasoning provided by the Circuit Court on this point. See, Petitioner's Appendix at App. 15-App. 20. The Circuit Court correctly applied *Williams v. Taylor*

II. THE EIGHTH CIRCUIT'S HARMLESS ERROR ANALYSIS COMPLIES WITH *CHAPMAN V. CALIFORNIA* AND *BRECHT V. ABRAHAMSON.*

The Eighth Circuit's policy of applying *Chapman v. California*, 386 U.S. 18 (1967), to constitutional violations which have not received a harmless error analysis in the state courts is entirely consistent with Supreme Court precedent and with the purposes behind habeas review.

Petitioner contends that this Court has developed two harmless error standards for non-structural trial errors: the *Chapman* standard for cases on direct [illegible] set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), for [illegible] fact, however, Respondent suggests that this Court's [illegible] different lines. As the Eighth Circuit aptly explained in *Orndorff v. Lockhart*, 998 F.2d 1426 (8th Cir. 1993), the question of whether *Brecht* or *Chapman* applies depends upon whether the constitutional error received a *Chapman* harmless error review before the case reached the federal courts on a habeas petition. The genesis for this dichotomy can be found in *Brecht* itself.

In *Brecht*, the petitioner claimed that the state's references during trial to his post-*Miranda* silence violated his right to due process. The state courts had agreed that Brecht's rights had been violated. However, Brecht was denied relief when the [illegible] determined, in accordance with *Chapman*, that the error [illegible] reasonable doubt." 507 U.S. at 626. Thereafter, Brecht [illegible] 28 U.S.C. § 2254, reasserting his due process claim.

When his claim reached the Supreme Court, however, the sole issue for debate was whether the federal courts were obligated, as the state had been, to consider the effect of the due process violation under *Chapman*. *Id.* at 622-23.

This Court concluded that Brecht's case should be resolved with a view toward the principles underlying habeas relief. *Id.* at 632. The Court noted that a petition for a writ of habeas corpus ordinarily follows a direct appeal in the state courts. *Id.* at 633. Because of the thoroughness of that process, a presumption of finality and legality attaches to a petitioner's conviction and sentence after direct review. The writ of habeas corpus provides a limited avenue for overcoming that presumption, and is reserved for those petitioners who have been grievously wronged. *Id.* at 634. Absent such circumstances, a federal habeas court must respect the state court's good-faith efforts to honor constitutional rights. *Id.* at 634-35.

Consistent with these principles, this Court decided that Brecht was not entitled to yet another *Chapman* review in his case. Justice Rehnquist wrote, "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review." *Id.* at 636. Such a decision would result in duplication and undermine the States' interest in the finality of its decisions. Therefore, "[a]bsent affirmative evidence that state-court judges are ignoring their oath," a less onerous harmless error analysis is appropriate on habeas review. *Id.*

The Eighth Circuit's decision in *Orndorff* follows *Brecht*'s reasoning to its only logical conclusion. Because this Court's opinion in *Brecht* was based on respecting the finality and integrity of state court decisions, it follows that *Brecht* does not apply if the state court has never achieved finality on the question of harmless error. *Orndorff*, 998 F.2d at 1430. In such instances, *Orndorff* does nothing more than ensure that, at some point in the progression of the case, a constitutional error receives the harmless error review this Court in *Chapman* proscribed. *See, Chapman*, 386 U.S. 218, 24 (1967).

Despite this overriding logic, Petitioner insists that other circuits and this Court itself have all rejected the Eighth Circuit's holding in *Orndorff*. Moreover, according to Petitioner, "[t]his Court simply did not restrict the application of the standard enunciated in *Brecht* to cases in which a petitioner had already raised the issue to the state courts under *Chapman*." Petitioner's Brief at 21. None of Petitioner's arguments, however, warrant granting a writ of certiorari.

First, while the Eighth Circuit may be in the minority in applying *Chapman*, the other circuits' failure to analytically recognize the true meaning of *Brecht* is no reason for this Court to accept certiorari. Instead, this Court should consider granting certiorari when a case is presented from a circuit court which applied the incorrect review standard. Newman's is not such a case. Second, this Court itself has never issued a decision in conflict with *Orndorff*. Certainly, the Supreme Court has reaffirmed its holding in *Brecht*, both in *California v. Roy*, 519 U.S. 2 (1997), and

in *Calderon v. Coleman*, 529 U.S. 141 (1998). However, the constitutional errors in both of those cases had already received harmless error review in the state courts. *See, Roy*, 519 U.S. at 3; *People v. Coleman*, 46 Cal.3d 749, 781 (1988). This Court's precedent, therefore, does nothing to undermine the Eighth Circuit's approach to errors which have never received harmless error review in state proceedings.

As for Petitioner's contention that the Eighth Circuit's ruling in *Orndorff* has stripped *Brecht* of significance, Petitioner overstates *Orndorff's* impact. In reality, the role of *Brecht* has already been lessened with the passage of the Anti Terrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"). Under the AEDPA, the federal courts do not perform their own harmless error analysis so much as review the reasonableness of a state court's harmless error calculus. *Nevers v. Killinger*, 169 F.3d 352 (6th Cir. 1999). Moreover, the stricter habeas standard recognized in *Orndorff* comes into play only when the state courts did not take the opportunity to review the error under *Chapman*. It has no effect at all in numerous other habeas cases. Finally, there are many instances in which the distinction between *Brecht* and *Chapman* does not even make a difference, either because the constitutional error is clearly harmless or clearly harmful under either standard.

Newman's case is a prime example of a case which required reversal under either *Brecht* or *Chapman*. As the Eighth Circuit's decisions recognize, Newman's was an extremely close case. The first trial on this offense, in which the prosecutor

introduced virtually the same evidence, ended in a mistrial when the jury could not reach a verdict. In such a case, almost any piece of evidence can tip the balance from innocence to guilt.

Nothing had more potential of influencing the jury than evidence bearing on the identity of the perpetrator of the crime. Because the main witnesses in the crime encountered the alleged attacker in the dark under circumstances particularly susceptible to unreliable identification,[1] each detail of identification was important. The question of whether Newman has a Hispanic accent was therefore crucial to determining whether he fit the description of the attacker. Under these circumstances, the panel was correct in concluding that the denial of Newman's right to present evidence on this point was not harmless beyond a reasonable doubt. Moreover, because of the exculpatory value of Newman's lack of a Hispanic accent, the constitutional violation could not have helped but have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Therefore, under either *Chapman* or *Brecht*, Newman is entitled to a writ of habeas corpus.

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[1]As the facts set forth in Newman's original brief demonstrate, the attack on Ms. Smith occurred late at night in her dimly-lit apartment, after she had been sleeping for hours. Smith testified that she was crying throughout the attack. Under these circumstances, anything that corroborated the victim's identification was crucial to a jury believing Newman was her attacker.

CONCLUSION

Based upon the foregoing argument, Newman respectfully submits that Petitioner's request for a writ of certiorari be denied.

Respectfully submitted,
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